IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3218 of 1990

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1. Malik Astur Ali
2. Abdul Manik @ Manik Ali
3. Sadikul Islam @ Sadakas Ali, Sons of Nasitullah, All residents of Village Azampur Shankar, Tola Ghuski, Police Station Barari, District Katihar

.... Petitioner/s

Versus

1. The State of Bihar through Secretary, Home Department, Govt. of Bihar, Patna
2. The Commissioner, Home Department, Govt. of Bihar, Patna
3. The Secretary, Home Dept., Govt. of Bihar, Patna
4. The Under Secretary, Govt. of Bihar, Patna
5. Superintendent of Police, District Katihar
6. Officer Incharge, Barari Police Station, District Katihar

.... Respondent/s

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Appearance :
For the Petitioner/s : Mr. Rajendra Prasad, Senior Advocate
Mr. Pramod Kumar, Advocate
Mr. Ritesh Kumar, Advocate
Mr. Pramod Kumar, Advocate
For the Respondent/s : Mr. Shashidhar Jha, AC to GA-1

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CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

Date: 01-03-2012

The Petitioners seek quashing of the orders contained in letters no.813, 814 and 817 all dated 14.3.1989 issued by the Under Secretary, Home Department, Government of Bihar, Patna ordering them to leave India within three days from the service of the order.

2. The background facts essential for the determination of this case are that a First Information Report was instituted against the present Petitioners on 25.6.1983 by way of a written statement submitted by the Officer

Incharge, Barari P.S. u/s.14 of the Foreigners Act.

3. The allegation in the First Information Report was that on a secret information received that some Bangladeshis had come near Azampur Shankar Bandh the Informant along with other police officials went to the place of occurrence to conduct an inquiry and examined Panjab Ali and Shaukat Ali of Village Aajpur Ranighat and the Mukhiya of Durgapur Panchayat i.e. Manzoor Alam and Chaukidar Bhushan Rishi. All these persons reportedly told him that Petitioner No. 1 along with two girls, namely, Bibi Rahima and Bibi Fatima and the other two Petitioners had been living on the Bandh since 4-5 years. They had heard that these Petitioners had come from Bangladesh having fled from there. The Petitioner Nos. 1 and 2 reportedly did not produce any passport or document authorising their stay in India. It was alleged that the Petitioners had committed an offence u/s.14 of the Foreigners Act since they were without any passport or any document with regard to stay in India.

4. From the Counter Affidavit filed on behalf of the Respondents, it appears that the S.P., Katihar had supervised the matter and submitted a report on 29.8.1985.

In the Supervision Note the allegations in the First Information Report were set out as also the fact that the witnesses in the First Information Report had supported the same. It contained the version of the informant that in course of conducting the inquiry, he had heard small children screaming that the Police had come to catch the Bangladeshis. The Mohalla Chaukidar and other villagers also confirmed that the accused were Bangladeshis. Witnesses Panjab Ali, Shaukat Ali and the Mukhiya Manzoor Alam further stated that the Petitioners had been living in the Village Ghuski Dist Maldah West Bengal since 8-10 years and had been living on to the banks of the canal for the last one and half years. The S.P. reported that when Petitioner no.3 was questioned, he stated that he had been living in India since last 10-15 years, but he did not produce any Passport or such document in its regard, whereas Petitioner no.1 did not give any satisfactory reply. Based on his own observations he concluded that the Petitioners had been living in Katihar for the last 1 ½ years and in Village Ghuski Dist. Maldah W.B for the last 10-12 years, on the basis of inputs received from the witnesses. He lastly concluded that the Petitioners were Bangladeshis

and had been living in India without acquiring its citizenship therefore fit to be prosecuted u/s.14 of the Foreigners Act. He, however, mentioned a Memo No.877(3) of Special Branch dated 17.12.1984 and added that the accused persons did not belong to village Ghisbar Hazi Tola, P.S. Manikchand, District Maldah as claimed but had been living in Village Khusbar, P.S. Manikchand, District Maldah. The accused persons stated that their father had brought them to Azampur Shankar Bandh Katihar and, therefore, nobody knew them in village Khusbar, District Maldah.

5. On 14.3.1989 the Under Secretary, Home Department issued a letter purportedly in exercise of powers u/s 3(2) (c) Foreigners Act, 1946 and directed the Petitioners to leave the Country within three days of service of Notice. The Petitioners then moved this Court under Writ Jurisdiction when by an interim order dated 25.7.1990 this Court directed that no coercive steps be taken against them.

6. The Petitioners challenged the Quit notice on the ground amongst others, that the order was violative of principles of natural Justice as no opportunity of hearing

had been afforded to them before the same was passed. The Petitioners further sought to substantiate their claims that they were Indian Citizens by bringing on record various documents in its support.

7. The Petitioners submitted that they were brothers being sons of late Nasitullah who died in the year 1970-71 and had been living with their father in village Khasbar Tola, P.O. Uttarchandpur, P.S. Manikchak under Manikchak Panchayat Samittee in the district of Maldah ever since their birth and working there as labourers. In the year 1970 petitioner nos.2 and 3 came to live in village Aajampur Shanker Tola Ghuski, P.S. Barari, District Katihar and settled on the land of Arshad Ali working in his farm. Chaukidari receipts were issued in the name of Petitioner no.2 and his name found place in the electoral roll of Barari constituency within Katihar District of the year 1975 and 1980. Petitioner no.3 was minor at that point in time. The name of Petitioner No.1, who had relocated himself to village Ghuski Tola from Khasbar Tola District Maldah, West Bengal also found place in the same electoral roll. In the year 1981 certain pieces of land were purchased by Petitioner no.2 and also mutated in his

name. The Chairman of Manikchak Panchayat Sammittee District Maldah issued a certificate on 17.12.1986 that the Petitioners had been living within that Panchayat Samitee in village Khoswar Tola since 1970. Thereafter the Mukhiya of Durgapur Gram Panchayat also issued a certificate that the Petitioners were living in village Azampur Shankar. The Petitioners argued that apart from these, other documents also supported their plea that they had been residing in the area since a long time. It was submitted that the Court below had granted bail to them on 22/23.7.1983 relying on the same.

8. It is noteworthy that the Respondents in their Counter Affidavit have conceded that the substantive case was subsequently withdrawn for reasons of State and Public Policy and a decision was taken to deport the Petitioners U/S.3(2)(C) Foreigners Act, 1946, but the affidavit is silent on the compulsions necessitating such a decision. Pursuant to the said decision the Under Secretary issued the impugned letters and directed the S.P. (Task Special Branch, Bihar, Patna) to execute the same. The State rejected the documents filed on behalf of the Petitioners in the present application on the ground that

they were not reliable, and, did not substantiate their claims of being Indian citizens. It once again charged the Petitioners of being of Bangladesh origin and of residing in India without valid documents.

9. In the present case as noted above, the defence of the Petitioners is that their family had migrated from Maldah and had relocated themselves at Village Azampur, Tola Ghuski, P.S. Barari, District Katihar.

10. The concept of 'Migration' had come up for consideration before the Supreme Court on importantly two occasions in the initial years of the formation of our nation when a large chunk of the populace was still in a state of flux owing to its indecisiveness as to which side of the boundary line they should opt to live in.

11. The Hon'ble Supreme Court in 1961 in the case of Smt Shanno Devi Vs. Mangal Sain (AIR 1961 SC 58) gave a narrow interpretation to the word "migration" appearing in Articles 6 and 7 of the Constitution Of India but in 1966 a Five judges bench in the case of Kulathi Mammu vs. The State of Kerala (AIR 1966 SC 1614) overruled the narrow interpretation of Shanno Devi (supra) and gave a wider meaning as "coming or going from one

place to another whether or not with intention to reside at latter place".

12. Therefore, the reasonable interpretation given is, a change in abode, which is the defence of the present Petitioners, but the question is, whether the Petitioners had a right to migrate or movement, because unlike Articles 14 and 21, Article 19 of the Constitution allows freedom of movement only to its qualified citizens .Hence what was crucial for determination in the present case was whether or, are not, Petitioners were citizens of India.

13. However this Court is not the competent forum to decide this issue, nor required to do so. Hence without evaluating the validity of the claims of the Petitioners it will proceed to examine how the relevant authorities had tackled the same keeping in mind that Indian laws do not mandate possession of any specific document by an Indian citizen to prove his citizenship. In an attempt at doing so, let us firstly understand the scheme of the Foreigners Act, 1946. The Act was purportedly introduced to provide for the exercise by the Central Government of certain powers in respect of the entry of foreigners into India, their presence therein and their departure therefrom. Section 2

sub clause 1 (a) defines foreigner “as a person, who is not a citizen of India”. Section 3 confers powers on the Govt. to issue such orders as specified therein in respect to a "foreigner". For sake of convenience the same is reproduced hereunder;

"3. Power to make orders.

(1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into 1[India] or, their departure there from or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner-

(a) shall not enter 1[India] or shall enter 1[India] only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;

(b) shall not depart from 1[India], or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;

(c) shall not remain in 1[India] or in any prescribed area therein; [(cc) shall, If he has been required by order under this section not to remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;]

(d) shall remove himself to, and remain in, such area in 1[India] as may be prescribed;

(e) shall comply with such conditions as may be prescribed or specified-

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;

(iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified;

(iv) requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be prescribed or specified

(v) requiring him to submit himself to such medical examination by such authority and at such time and place as may be prescribed or specified;

(vi) prohibiting him from association with persons of a prescribed or specified description;

(vii) prohibiting him from engaging in activities

of a prescribed or specified description;

(viii) prohibiting him from using or possessing prescribed or specified articles;

(ix) otherwise regulating his conduct in any such particular as may be prescribed or specified;

(f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions;

(g) shall be arrested and detained or confined;] and may make provision 3[for any matter which is to be or may be prescribed and] for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

(3) Any authority prescribed in this behalf may with respect to any particular foreigner make orders under clause (e) 2[or clause (f)] of sub-section (2).]"

[Underlining mine]

14. Section 14 provides penalty for 5 years for violation of visa rules and contravention of the provisions of this Act or of any order made thereunder or any direction given in pursuance of this Act or such order for which no specific punishment is provided under this Act.

15. Significantly Section 9 creates an exception to the general law of evidence:

> *"**9. Burden of proof**.-If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person."*

16. However, the Act in itself is silent as to how this burden is to be discharged. In 1964 the Central Govt promulgated the Foreigners Tribunal Order in exercise of its powers u/s 3 of the Foreigners Act by which a tribunal was to conduct an inquiry to determine the question of legitimacy of a claim of citizenship, on reference by the Central Government. It provides for an elaborate procedure giving an opportunity to the person charged to prove his claim. The procedure finds mention in the case of Sarbananda Sonowal v. Union of India and another (AIR 2005 SC 2920) quoted later in this judgement.

Notably in the present case the State has not elaborated on the decision-making process nor has it taken a stand that the Petitioners case was referred to the Tribunal, constituted either under the Foreigners (Tribunal) Order, 1964 or under (The) Illegal Migrants (Determination by Tribunals) Act, 1983. It has merely stated in Para 8 of its Counter Affidavit as follows:

> *"In accordance with the instructions received from the Govt. of India in the Ministry of Home Affairs from time to time the case pending for trial against the above named five persons was ordered to be withdrawn in expediency of prosecution for reasons of State and public policy and they were ordered to be deported from India..... The instructions of Government of India, Ministry of Home Affairs are crystal clear in this regard. In nutshell the spirit of the instruction is that if any foreigner including Pakistani or Bangladeshi citizen was found to be staying in India without any valid documents he should be ultimately deported from India and if any case is pending in any Trial Court against him such cases should first be*

withdrawn and the concerned foreigners should thereafter be deported from India."

17. This affidavit unfortunately reveals nothing more than the callous manner in which the Authorities decided the fate of the Petitioners who were undoubtedly ignorant, illiterate, poor and defenceless, locking their lives in files, and putting them on the mechanical conveyor belt of bureaucracy. In my view, along with the five senses, a man is born with the expectation of being treated a Person during his lifetime. When it is denied, it becomes his right which is natural and inalienable. The more mature a Political State the more watchful it is of its upkeep and keen to accord it respect. However, irrespective of the scale of maturity of the State, a refined judicial system uniformly ensures the same, in instances of risk.

18. Another important point which arises for consideration is that the scheme of Section 3(2) of the Foreigners Act stipulates action only in circumstances of "foreigners". In such situation, in my opinion, the Authorities could not have assumed power, when none was conferred, to take a decision to deport just any person without deciding the question of his citizenship. The

specific proviso in the Act contemplates a conditional, not absolute power.

19. Under these circumstances when the State itself admits that the decision was based on a facile application of Govt Circulars, showcasing misplaced power derived from them, without taking the least care to determine the fundamental issue of citizenship, this Court would be inclined to hold that the order purportedly passed under Section 3 Foreigners Act on the basis of uncorroborated, untested, vague and hearsay allegations contained in the First Information Report is completely without jurisdiction, non-est in the eye of law and indefensible.

20. Since the State appears to have passed the order on a presumption, it would be important to clarify that Section 9 of the Foreigners Act may shift the burden of proof or onus on the accused but it does not destabilize or unsettle the fundamental principle of presumption of innocence. All that it requires, is, that once charged, the onus would be on the Accused to prove his innocence.

21. Moreover, the fact in issue, whether the Petitioners were Indians or Bangladeshis could be proved only through a certain mode and as per Section 3 of the Indian

Evidence Act which stipulates the follows:

> *"Proved" - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.*

22. Proof according to the Evidence Act is a bundle of facts which the Court has to determine to exist and it can only be appreciated when the same is brought by a Party before it. Needless to say the content of the First Information Report or subsequent investigation are not evidence and, by itself not capable of proving anything.

23. The importance of shifting of burden of proof under the Foreigners Act and how and why it works to the advantage of a person charged has been explained by the Apex Court while hearing lengthy arguments in the case of Sarbananda Sonowal vs Union of India and Anr (AIR 2005 SC 2920) allowing the Public Interest Litigation filed for declaring (The) Illegal Migrants (Determination by Tribunals) Act, 1983 ultra vires and a consequent declaration that the Foreigners Act and Rules be made applicable in Assam. I hasten to add that it is on the given

presupposition that a Tribunal was constituted to determine the question of nationality as provided under Section 3 of the Foreigners Act which paragraph 15 reveals. Para 15 and 17 are extracted below for a better understanding:

"15. The Central Government has made the Foreigners (Tribunals) Order, 1964 in exercise of powers conferred by Section 3 of the Foreigners Act. Clause 2(1) of this Order provides that the Central Government may by order refer the question as to whether a person is or is not a foreigner within the meaning of Foreigners Act, 1946, to a Tribunal to be constituted for the purpose, for its opinion. Clause 3(1) provides that the Tribunal shall serve on the person to whom the question relates, a copy of the main grounds on which he is alleged to be a foreigner and give him a reasonable opportunity of making a representation and producing evidence in support of his case and after considering such evidence as may be produced and after hearing such persons as may deserve to be heard, the Tribunal shall submit its opinion to the officer or authority specified in this behalf in the order of reference. Clause 3(1-A) provides that the

Tribunal shall, before giving its opinion on the question referred to in sub-paragraph (1-A) of paragraph 2, give the person in respect of whom the opinion is sought, a reasonable opportunity to represent his case. Clause 4 provides that the Tribunal shall have the powers of a Civil Court while trying a suit under the Code of Civil Procedure in respect of summoning and enforcing the attendance of any person and examining him on oath, requiring the discovery and production of any document and issuing commissions for the examination of any witness."

"17. There is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth, (ii) place of birth, (iii) name of his parents, (iv) their place of birth and citizenship. Sometimes the place of birth of his grand-parents may also be relevant like under Section 6-A (1) (d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the

person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

24. There is another point which merits consideration on facts. The conclusion arrived at by the Supervising Authority is that the Petitioners by a rough estimate had been living in Katihar since the last 1-1/12 years and before that, were residing in West Bengal for about 10-12 years. By this calculation the Petitioners had been living in India since the last 11-131/2 years which would bring the date of their residence to between mid 1969 to 1972.In an Affidavit filed on behalf of the Union of India in the case of Sarbananda (supra) it was brought to the notice of the Apex Court that pursuant to talks between the Indian

and Bangladeshi Prime Minister, the Indian Govt. had issued a Circular dated 30.9.1972 legitimising the stay of Bangladeshis who had crossed over the borders before 25.2.1971. The relevant portion of the Affidavit is extracted below:

> *"7. During talks between the Prime Ministers of India and Bangladesh in February, 1972, the Prime Minister of Bangladesh had assured the return of all Bangladesh nationals who had taken shelter in India since March 25, 1971. Accordingly a circular was issued by the Government of India on 30.9.1972 setting out guidelines for action to be taken in respect of persons who had come to India from Bangladesh. According to this circular, those Bangladesh nationals who had come to India before 25 March 1971 were not to be sent back and those who entered India in or after the said date were to be repatriated."*

Under these circumstances, the impugned orders are clearly, either in violation of the Government of India circular, or without paying due attention to the same. The

Authorities were evidently required to conduct a more conscientious, systematic inquiry, especially in view of their own assessment of the period of Petitioners residence in India being very close to the notified date.

25. The dimension of the case requires attention from yet another internationally recognised standpoint. Article 14(2) of The International Covenant on Civil and Political Rights spells out the right to presumption of innocence, whereas Article 14(3) lays down the minimum requirement to be afforded to a criminally charged person. Article 14(3)(a)(b)(e) of the International Covenant on Civil and Political Rights reads thus:

> *"3.(a): To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
> *(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
> *(e) To examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."*

Thus it confirms and protects the basic human rights in the same manner as is already intrinsic in our

procedural laws.

26. Our own Judicial System has been consistently more than careful on applications of such fundamental principles of law and therefore in recognition of the same in the case of Abdul Sattar Haji Ibrahim Patel, Appellant v. State of Gujarat, Respondent [AIR 1965 SC 810], five Judges Bench of the Hon'ble Supreme Court while considering the challenge to the correctness and validity of the order of the High Court of Gujarat, by which the Appellant had been sentenced to one year imprisonment u/s.14 of the Foreigners Act, it remanded the matter to the Court below to enable the Appellant to lead further evidence in his defence. One of the grievances of the Appellant was that he had been prevented from examining certain witnesses on his behalf on the point of validity of obtaining an Indian Passport for reasons beyond his control.

27. Paragraph 13 of the said judgment is extracted below:

> *"(13) It appears that during the course of the trial the appellant wanted to prove his case that he had obtained an Indian passport in 1954 by examining certain witnesses, and in that behalf*

he filed a list of witnesses on January 21, 1960. Amongst these witnesses was witness No.6, clerk of the D. F. O. of the assistant Secretary, Political and Services Department, and he was called upon to produce the original or copy of the Indian Passport No. C. O. 41323 dated April 8, 1954, given to the appellant and all applications made by the appellant in regard to it. The list contained the names of other witnesses also, some of whom were examined. Summons to the 6th witness was sent through the Chief Secretary to the Government of Bombay. For no fault of the appellant, the witness did not turn up and the passport was not produced, and, as we have already stated, the other evidence adduced by the appellant was not accepted by the High Court."

In the case at hand since no substantive case survives for determination it cannot be remanded and has to be dealt with appropriately by this Court.

28. Here I also wish to refer to a case that came up before the Gauhati High Court challenging the summary procedure adopted by the Tribunal constituted under the Illegal Migrants (Determination by Tribunals) Act 1983, while it was in existence, in the case of Md. Sahid Ali

Fakir and others, v. Union of India and another, [AIR 1993 Gauhati, page-9] wherein it was held that when the State came with the complaint that the accused migrated into India in 1973, onus was on the complainant to prove the allegation.

Paragraph 6 of the said judgment further went on to very aptly describe the trauma a person would face if an adverse order is passed without due diligence. It is extracted below:

> *"6. It is needless to point out that when millions of people of a particular race/community and of mother tongue are citizens of India and permanent resident in Assam, persons of that race/ community and of mother tongue, who are residing permanently are to be taken as citizen of India unless contrary is proved. The burden is on the State to rebut the presumption by adducing cogent evidence and placing materials. Determination of such persons as foreign national and consequent deportation from his permanent residence with the members of his family and throwing them to unknown destination would naturally entail immense suffering. Before adjudging the person permanently residing in India (Assam) as foreign national, the Tribunal should be*

cautious, slow, retrospect and should make close scrutiny of the materials on records to see as to whether the State has been able to establish the case against such person with cogent, consistent and convincing evidence. Summary enquiry by the Tribunal is fraught with every possibility of adjudging a citizen as foreign national and subjecting him to deprivation of his fundamental right guaranteed under Article 21 and the right under Article 300 A of the Constitution, without any authority of law. It is unsafe to adjudge a person residing permanently in India (Assam) as foreigner on the sole testimony of the Enquiry Officer. In the instant case, the learned tribunal solely on the basis of the hearsay evidence of one witness examined on behalf of the State held that the Petitioners migrated into India (Assam) in the year 1973. It is apparent from the evidence of the said witness examined on behalf of the State that he came to know that the Petitioners migrated in 1973 and settled in Basimari village from one Lohit Nath and one Kinaram Nath. But none of them has been examined to corroborate the hearsay evidence of the sole witness."

29. Elaborating further, this Court wishes to mention that in line with the philosophy of the International Covenants ensuring fairness in procedure in assertion of

political rights of a person, our own Constitution guarantees the following as a fundamental right :

"21. Protection of life and personal liberty.- No person shall be deprived of his life or personal liberty except according to procedure established by law."

Unlike Article 19, it provides for protection to any person irrespective of his citizenship. And, therefore, even if the Authorities had proceeded on the assumption that the Petitioners were Bangladeshis they would have to satisfy this Court that they had followed the procedure established by law. Here, not only has the State failed to bring any material to substantiate that it had adhered to the procedures laid down in Foreigners Tribunal Order, 1964 or (The) Illegal Migrants (Determination by Tribunals) Act, 1983 but, the records demonstrate that it had also denied the Petitioners the universal basic human right, i.e. audi alteram partem.

To quote Lord Denning as he had said in Schmidt v. Secretary of State for Home Affairs [(1969)2 Ch D 149] -

> *"Where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf."*

30. The issue that even administrative orders are amenable to challenge on the principle of 'Fair-play in action' is now settled. The concept of "due process of law" is not illusory but a substantial human right. Justice Bhagwati speaking for himself, Untwalia and Fazal Ali, JJ. in the case of Mrs. Maneka Gandhi Versus Union Of India And Another [(1978) 1 Supreme Court Cases 248] Para 10 very succinctly put this concept in place in the following manner:

> *"The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both."*

31. His Lordship traced the history of development of this aspect of law both in England and India and thereafter concluded:

> *"This Cement Companies Ltd. V. P. N. Sharma where development in the law had its parallel in India in the Associated this Court approvingly referred to the decision in Ridge v. Baldwin*

(supra) and, later in State of Orissa v. Dr. Binapani Dei observed that: "If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power".

32. In view of the aforesaid discussions, this Court concludes, that the impugned orders deserve to be set aside, not only because they demonstrate blatant arbitrariness, are procedurally incompetent but, also, because they are an abuse of the trust reposed in a Public Servant, in dereliction of his duty, which was, primarily, to preserve the life and liberty of a person, whether, or not, an Indian.

33. Accordingly, this application stands allowed.

(Anjana Prakash, J.)

Patna High Court
Dated 1st March, 2012
Narendra/AFR